

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JIMMY D. PENWELL

Claimant

VS.

VULCAN CHEMICALS

Respondent

Self-Insured

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Docket No. 1,004,171

ORDER

Respondent requests review of the October 20, 2004 Award entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Appeals Board (Board) heard oral argument on April 12, 2005.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for claimant. John B. Rathmel of Prairie Village, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award.

ISSUES

In her October 20, 2004 Award, the ALJ determined claimant met with personal injury by accident culminating on January 8, 2002. Based upon claimant's testimony, together with the testimony of the medical experts, the ALJ found claimant suffered an aggravation or worsening of his preexisting back condition through a series of work-related traumas constituting an accident and injury. Although the ALJ found claimant made a good faith effort to return to gainful employment, post-injury, she nevertheless imputed a post-accident wage to claimant of \$320 per week based upon the testimony of vocational expert Jerry Hardin that claimant retained the ability to earn that amount in the open labor

market. The ALJ awarded claimant a 65.5 percent work disability arrived at by utilizing the 55 percent task loss opinion of Dr. Pedro A. Murati and a 76 percent wage loss.

Respondent argues there is no evidence in the record that claimant suffered a permanent aggravation of his preexisting condition during the period of time in question. Therefore, claimant cannot be awarded a permanent partial disability. Respondent also contends claimant is not a credible witness and that his documented actions together with omissions indicate that he cannot be considered reliable. Respondent further asks the Board to find that claimant did not suffer a new accidental injury as alleged in this docketed claim, but, instead, to find his current condition is the natural progression of his previous injury for which he had already been compensated in a previous claim, Docket No. 225,328. Respondent asks the Board to deny claimant all benefits.

Claimant contends the evidence in this case proves that claimant had continuous pain from July of 2001 until he underwent surgery; that claimant's activities of ranching and team roping did not aggravate claimant's spondylolisthesis; and that the medical evidence will show claimant's spondylolisthesis remained the same from the first time he was seen by a physician until his surgery in November 2002. Claimant also contends that he made a good faith job search effort and, therefore, is entitled to a wage loss utilizing his actual post-accident wage. Comparing his pre-injury average weekly wage of \$1,310.68 with the \$180.08 claimant was actually earning after the injury results in an 86 percent wage loss. Averaging the 86 percent wage loss with the 55 percent task loss, claimant has a work disability of 70.5 percent. Accordingly, claimant requests the Board to award a 70.5 percent permanent partial disability.

The issues before the Board are nature and extent of claimant's disability, claimant's average weekly wage, whether claimant suffered personal injury by accident on the dates alleged, whether claimant's injuries arose out of and in the course of his employment with respondent, and whether claimant suffered a subsequent injury after he left respondent's employ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board finds that claimant suffered a temporary aggravation of his preexisting condition from his work activities through January 8, 2002, which thereafter resolved. Claimant's condition returned to its prior status. Respondent is responsible for claimant's medical treatment expenses through April 10, 2002, when claimant reported he was pain-free and he was released without restrictions by Dr. Alan Moskowitz.

Claimant's current condition and his need for the November 6, 2002 fusion surgery, if in fact that surgery was medically necessary, are the result of a combination of factors, including a natural progression of his prior work-related injury which was superimposed on

a preexisting spondylolisthesis at L5-S1, and his activities since leaving his job with respondent, including the intervening accident in May 2002, when claimant fell from a horse.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated October 20, 2004, should be, and is hereby, modified to deny claimant an award of permanent partial disability compensation.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jimmy D. Penwell, and against the respondent, Vulcan Chemicals, a self-insured, for a personal injury by accident culminating on January 8, 2002, for 8.14 weeks of temporary total disability compensation at the rate of \$417 per week or \$3,394.38, and all reasonable and related medical expenses through April 10, 2002, all of which is past due and ordered paid less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of May 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
John B. Rathmel, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director